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No. 08-1358

IN THE
Supreme Court of the United States

BRANDY AILEEN HOLMES,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF GRANT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, the Constitution Project moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of *certiorari*. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has refused to consent.

Under Article 905.9 of the Louisiana Code of Criminal Procedure, the Louisiana Supreme Court must review every death sentence to determine if it is

excessive. That court's rules require it to review each death sentence for arbitrariness and to consider whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. In recent years, however, the state court has repeatedly failed to comply with that mandate. In particular, as in Ms. Holmes's case, the court has repeatedly failed to conduct an adequate proportionality review, comparing only the facts of a crime to the facts of other capital cases, while disregarding defendant's mitigating circumstances. The Louisiana Supreme Court's failure to conduct a meaningful and vigorous review of mitigation violates the Eighth Amendment to the United States Constitution.

Amicus curiae is a bipartisan non profit organization that seeks solutions to constitutional issues through scholarship and public education. Although the Constitution Project takes no position on capital punishment, it is deeply concerned with the preservation of our fundamental civil rights, including our Eighth Amendment right to be free from the arbitrary, capricious, and discriminatory imposition of the death penalty. In 2000, the Project convened a blue-ribbon committee to evaluate current procedural safeguards. The committee was comprised of a broad spectrum of individuals with extensive experience with the criminal justice system and included both supporters and opponents of capital punishment. After conducting a careful and considered evaluation of the various death penalty systems in this country, the committee concluded that there are currently insufficient protections in place to ensure fundamental fairness. Among other things, the committee

emphasized the need for states to adopt meaningful appellate review of death sentences, including adopting proportionality review mechanisms.

Amicus curiae's extensive knowledge of the appellate review procedures in place in this country and its goal of helping to ensure the protection of our civil rights gives it a strong interest in the resolution of the question raised by the petitioner in this case. Accordingly, *amicus curiae* respectfully requests leave to file the attached brief that describes in detail those appellate procedures and why the Louisiana Supreme Court's approach is inconsistent with not only its own state law scheme but also with the requirements of the Eighth Amendment.

Respectfully submitted,

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June 4, 2009

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BRIEF FOR THE CONSTITUTION PROJECT, AS *AMICUS CURIAE* IN SUPPORT OF GRANT OF CERTIORARI

Amicus curiae, the Constitution Project respectfully submits this brief in support of the petition for a writ of *certiorari.*

STATEMENT OF INTEREST

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education.[1] The Project's essential mission is to promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. The Project promotes this Court's role as the ultimate arbiter of the meaning of those constitutional guarantees.

In 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Initiative does not take a position on the death penalty, it is

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief. A letter confirming Petitioner's consent to the filing of this *amicus* brief has been submitted to the Clerk. Respondent has refused to give its consent. Accordingly, *amicus* is filing concurrently herewith a motion for leave to file this brief pursuant to Rule 37.2 of the Rules of this Court.

concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. The Committee issued its first report in 2001,[2] and in 2006, issued an updated version of its report with thirty-two consensus recommendations. The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2006), *available at* http://www.constitutionproject.org/manage/file/30.pdf (last visited June 2, 2009).

Recommendation 11 and the corresponding commentary in *Mandatory Justice* describe the need for states to adopt and implement proportionality review mechanisms that will meaningfully reduce the risk of the arbitrary, capricious, and discriminatory application of the death penalty, as required by *Furman v. Georgia*, 408 U.S. 238 (1972). *Mandatory Justice* at 39-41. The Louisiana Supreme Court's failure in this case and in others to conduct meaningful appellate review of death sentences is in direct contravention of this recommendation and poses an impermissible risk that the death penalty is being administered in violation of the Eighth Amendment. The Constitution Project therefore urges that the petition for *certiorari* be granted.

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[2] The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001), *available at* http://www.constitutionproject.org/manage/file/31.pdf (last visited June 2, 2009).

SUMMARY OF THE ARGUMENT

Appellate review of mitigation serves as a necessary check against the arbitrary and capricious imposition of the death penalty as prohibited by the Eighth Amendment to the United States Constitution. Today, the majority of death penalty schemes either authorizes comparative proportionality review or provides for an alternative vehicle to ensure meaningful appellate review of mitigation. Although the State of Louisiana's capital punishment scheme contains provisions purporting to require appellate comparative proportionality review and review for arbitrariness, in the case of Brandy Aileen Holmes — as in other recent Louisiana capital cases —the Louisiana Supreme Court failed to conduct such a review or give any consideration to her mitigating circumstances before affirming her death sentence.

The court's failure was not for a lack of compelling mitigation evidence. Born with Fetal Alcohol Syndrome ("FAS"), Ms. Holmes spent the majority of her teen and young adult years institutionalized. In addition to FAS, she suffers from organic brain damage, borderline mental retardation, Post-Traumatic Stress Disorder, and chronic and severe depression. Her chaotic childhood was marked by physical and sexual violence as well as poverty and neglect. At the age of twenty-six, Ms. Holmes entered into an abusive relationship with her co-defendant, an older man who controlled her and whom the State argued was the likely triggerman.

The important question of law raised by the Louisiana Supreme Court's limited review of Ms. Holmes's death sentence is whether meaningful appellate review of such powerful mitigation is constitutionally required by the Eighth Amendment.

For these reasons, *amicus curiae* urges the Court to grant the Petition for *certiorari*.

ARGUMENT

I. MEANINGFUL APPELLATE REVIEW OF MITIGATION IS REQUIRED TO GUARD AGAINST THE ARBITRARY AND CAPRICIOUS ADMINISTRATION OF THE DEATH PENALTY.

Beginning with *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court has consistently affirmed that meaningful appellate review is a necessary component of a constitutional death penalty scheme.[3] The Court

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[3] *See Gregg*, 428 U.S. at 195, 206 (upholding Georgia's death penalty statute in significant part because of its appellate review provisions); *Proffitt v. Florida*, 428 U.S. 242, 251-53 (1976) (upholding Florida's statute in significant part because its appellate review provisions require a substantive and comparative consideration of all cases); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas's statute after concluding that its appellate review provisions provide a "means to promote the evenhanded, rational, and consistent imposition of death sentences under law"); *Zant v. Stephens*, 462 U.S. 862, 890 (1983) (upholding a Georgia death sentence because of, *inter alia*, the "existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality"); *Parker v.*

has been equally as clear that the Eighth Amendment requires robust consideration and weighing of mitigating evidence. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (striking North Carolina's mandatory death scheme because, *inter alia*, it "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors" and holding that the "fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender"); *Tennard v. Dretke*, 542 U.S. 274, 278 (2004) (noting that the Eighth Amendment requires that the sentencer is able to "consider and give effect" to mitigating evidence); *Abdu-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("[O]ur cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating

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Dugger, 498 U.S. 308, 321 (1991) (stressing the "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally"); *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) ("[T]his Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency."); *McKoy v. North Carolina*, 494 U.S. 433, 469 (1990) (Scalia, J., dissenting) ("Moreover, by enabling the reviewing court to examine the specific findings underlying the verdict it facilitates appellate review, which we have described as 'an important additional safeguard against arbitrariness and caprice." (citation omitted)); *see also Walker v. Georgia*, 129 S. Ct. 453, 454 (2008) (Stevens, J., statement respecting the denial of *certiorari*) (explaining that the decision in *Gregg* to uphold the Georgia statue "was founded on an understanding that the new procedures the statute prescribed would protect against the imposition of death sentences influenced by impermissible factors," and citing appellate proportionality review as one of those critical procedures).

evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future").

In two cases, *Parker v. Dugger*, 498 U.S. 308 (1991) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court has explicitly acknowledged the importance of appellate review of mitigation. In *Parker*, the Court reversed defendant's death sentence because the Florida Supreme Court had failed to conduct an independent review of the trial court's imposition of the death penalty, and had failed to consider and weigh the evidence presented at trial of non-statutory mitigating circumstances. *Parker*, 498 U.S. at 321-22. In *Eddings*, the Court similarly vacated defendant's death sentence because *both* the sentencing trial judge and the reviewing Oklahoma Court of Criminal Appeals[4] had failed to consider and give weight to defendant's evidence of mitigation. *Eddings*, 455 U.S. at 114-115 ("The sentencer, and the *Court of Criminal Appeals on review*, may determine the weight to be given relevant mitigating evidence, [b]ut they *may not give it no weight by excluding such evidence from their consideration.*") (emphasis added).

Of the thirty-five states that authorize the death penalty today, the majority, nineteen, require comparative proportionality review, as does the

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[4] The Oklahoma Court of Criminal Appeals reviewed the defendant's death sentence in connection with its consideration of appellant's claim that his death sentence was excessive in light of mitigating factors. *Eddings*, 455 U.S. at 113 n.9.

military law.[5] *See* Appendix I, Death Penalty Appellate Review Procedures. As the Court observed in examining Georgia's approach in the early 1970s, the collective experience of those jurisdictions is that a comparative proportionality review can be an effective method of preventing the infliction of arbitrary death sentences. *Gregg*, 428 U.S. at 205 (describing reversals by the Georgia Supreme Court and concluding that the court "has taken its review responsibilities seriously" with respect to proportionality review, thereby reducing the risk of the arbitrary infliction of the death penalty). In the years since *Gregg*, a number of courts have used comparative

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[5] Proportionality review is required by statute or case law in the following states: Alabama, Ala. Code §13A-5-53(b)(3) (enacted 1981); Delaware, Del. Code Ann. Title 11 §4209(g)(2)(a); Florida, by case law, *see, e.g.*, *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995); Georgia, Ga. Code Ann. §17-10-35(c)(3) (enacted 1973); Kentucky, Ky. Rev. Stat. Ann. §532.075(3)(c) (enacted 1976); Louisiana, La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (enacted 1977); Mississippi, Miss. Code Ann. §99-1-105(3)(c) (enacted 1977); Missouri, Mo. Ann. Stat. §565.035(3)(3) (enacted 1983); Montana, Mont. Code Ann. §46-18-310(1)(c) (enacted 1977); Nebraska, Neb. Rev. Stat. §29-2521.03 (enacted 1978); New Hampshire, N.H. Rev. Stat. Ann. § 630:5(XI)(c) (enacted 1986); North Carolina, N.C. Gen. Stat. §15A-2000(d)(2) (enacted 1977); Ohio Rev. Code Ann. §2929.05(A) (enacted 1981); South Carolina, S.C. Code Ann. §16-3-25(C)(3) (enacted 1977); South Dakota, S.D. Codified Laws §23A-27A-12(3) (enacted 1979); Tennessee, Tenn. Code Ann. §39-13-206(c)(1)(D) (enacted 1992); Utah, by case law, *see, e.g.*, *State v. Lafferty*, 20 P.3d 342 (Utah 2001); Virginia, Va. Code § 17.1-313(C)(2) (enacted 1998); Washington, Wash. Rev. Code Ann. §10.95.130(2)(b) (enacted 1981). Death sentences imposed under the Uniform Code of Military Justice must also be reviewed using a comparative proportionality analysis. *See United States v. Curtis*, 32 M.J. 252, 270-271 (C.M.A. 1991) .

proportionality review to set aside arbitrary death sentences.[6]

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[6] *Henry v. State*, 647 S.W.2d 419, 488 (Ark. 1983); *Sumlin v. State*, 617 S.W.2d 372, 375 (Ark. 1981); *State v. Fierro*, 804 P.2d 72, 90 (Ariz. 1990); *Hall v. State*, 244 S.E.2d 833, 839 (Ga. 1978); *Ward v. State*, 236 S.E.2d 365, 368 (Ga. 1977); *Allen v. State*, 636 So. 2d 494, 497-98 (Fla. 1994); *Amoros v. State*, 531 So. 2d 1256, 1261 (Fla. 1988); *Besaraba v. State*, 656 So. 2d 441, 447 (Fla. 1995); *Blair v. State*, 406 So. 2d 1103, 1109 (Fla. 1981); *Blakely v. State*, 561 So. 2d 560, 561 (Fla. 1990); *Caruthers v. State*, 465 So. 2d 496, 498-99 (Fla. 1985); *Chaky v. State*, 651 So. 2d 1169, 1173 (Fla. 1995); *Clark v. State*, 609 So. 2d 513, 516 (Fla. 1992); *DeAngelo v. State*, 616 So. 2d 440, 443-44 (Fla. 1993); *Farinas v. State*, 569 So. 2d 425, 431-32 (Fla. 1990); *Garron v. State*, 528 So. 2d 353, 361 (Fla. 1988); *Hazen v. State*, 700 So. 2d 1207, 1214-15 (Fla. 1997); *Herzog v. State*, 439 So. 2d 1372, 1381 (Fla. 1983); *Johnson v. State*, 720 So. 2d 232, 238-39 (Fla. 1998); *Jones v. State*, 963 So. 2d 180, 187 (Fla. 2007); *Klokoc v. State*, 589 So. 2d 219, 222 (Fla. 1991); *Knowles v. State*, 632 So. 2d 62, 67 (Fla. 1993); *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993); *Livingston v. State*, 565 So. 2d 1288,1292 (Fla. 1988); *Lloyd v. State*, 524 So. 2d 396, 403 (Fla. 1988); *McCaskill v. State*, 344 So. 2d 1276, 1280 (Fla. 1977); *McKinney v. State*, 579 So. 2d 80, 85 (Fla. 1991); *Morgan v. State*, 639 So. 2d 6, 13-14 (Fla. 1994); *Nibert v. State*, 574 So. 2d 1059, 1062-63 (Fla. 1990); *Penn v. State*, 574 So. 2d 1079, 1083-84 (Fla. 1991); *Proffitt v. State*, 510 So. 2d 896, 898 (Fla. 1987); *Puccio v. State*, 701 So. 2d 858, 863 (Fla. 1997); *Rembert v. State*, 445 So. 2d 337, 340-41 (Fla. 1984); *Robertson v. State* 699 So. 2d 1343, 1347 (Fla. 1997); *Ross v. State*, 474 So. 2d 1170, 1174 (Fla. 1985); *Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994); *Slater v. State*, 316 So. 2d 539, 542-43 (Fla. 1975); *Smalley v. State*, 546 So. 2d 720, 723 (Fla. 1989); *Songer v. State*, 544 So. 2d 1010, 1011-12 (Fla. 1989); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991); *Terry v. State*, 668 So. 2d 954, 965-66 (Fla. 1996); *White v. State*, 616 So. 2d 21, 25-26 (Fla. 1993); *Williams v. State*, 707 So. 2d 683, 686 (Fla. 1998); *Wilson v. State*, 493 So. 2d 1019, 1023-24 (Fla. 1986); *Woods v. State*, 733 So. 2d 980, 991-92 (Fla. 1999); *State v. Pratt*, 873 P.2d 800, 823-25 (Idaho

Many of those reversals resulted from the consideration given to mitigation by the appellate courts during their comparative review analysis. *See, e.g., State v. Thompson,* No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, at *33-36 (Tenn. Crim. App. April 25, 2007) (reversing death sentence of a defendant with a "long and documented history of mental illness" after conducting a comparative review of all cases involving similar defendants and similar crimes); *State v. Kemmerlin*, 573 S.E.2d 870, 897-99 (N.C. 2002) (setting aside death sentence as disproportionate given

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1993); *State v. Scroggins,* 716 P.2d 1152, 1158-61 (Idaho 1985); *State v. Windsor,* 716 P.2d 1182, 1192-95 (Idaho 1985); *People v. Buggs,* 493 N.E.2d 332, 336-37 (Ill. 1986); *People v. Carlson,* 404 N.E.2d 233, 244-45 (Ill. 1980); *People v. Gleckler,* 411 N.E.2d 849, 861 (Ill. 1980); *People v. Johnson,* 538 N.E.2d 1118, 1130-31 (Ill. 1980); *Biondi v. State,* 699 P.2d 1062, 1066-67 (Nev. 1985); *Harvey v. State,* 682 P.2d 1384, 1385-87 (Nev. 1984); *Haynes v. State,* 739 P.2d 497, 503-04 (Nev. 1987); *State v. Sonnier,* 380 So. 2d 1, 7-9 (La. 1979); *Coleman v. State,* 378 So. 2d 640, 649-50 (Miss. 1979); *Edwards v. State,* 441 So. 2d 84, 92-94 (Miss. 1983); *Reddix v. State,* 547 So. 2d 792, 794-95 (Miss. 1989); *Bullock v. State,* 525 So. 2d 764, 768-70 (Miss. 1987); *State v. Chaney,* 967 S.W.2d 47, 59-60 (Mo. 1998); *State v. McIlvoy,* 629 S.W.2d 333, 341-42 (Mo. 1982); *State v. Kemmerlin,* 573 S.E. 2d 870, 897-99 (N.C. 2002); *State v. Benson,* 372 S.E.2d 517, 552-23 (N.C. 1988); *State v. Bondurant,* 309 S.E.2d 170, 182-83 (N.C. 1983); *State v. Hill,* 319 S.E.2d 163, 170-72 (N.C. 1984); *State v. Jackson,* 305 S.E.2d 703, 716-18 (N.C. 1983); *State v. Rogers,* 341 S.E.2d 713, 731-33 (N.C. 1986); *State v. Stokes,* 352 S.E.2d 653, 663-68 (N.C. 1987); *State v. Young,* 325 S.E.2d 181, 192-94 (N.C. 1985); *State v. DiFrisco,* 900 A.2d 820, 832-33 (N.J. 2006); *State v. Papasavvas,* 790 A.2d 798, 804-12, 817-18 (N.J. 2002); *Munn v. State,* 658 P.2d 482, 487-88 (Okla. Crim. App. 1983); *State v. Hale,* 840 S.W.2d 307, 314-15 (Tenn. 1992); *State v. Thompson,* No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, at *33-36 (Tenn. Crim. App. April 25, 2007).

the totality of circumstances, including weak evidence in aggravation and the presence of six mitigating factors); *State v. Chaney*, 967 S.W.2d 47, 60 (Mo. 1998) (reversing death sentence following a comparative proportionality review based, *inter alia*, on mitigating evidence of defendant's positive character); *Klokoc v. State*, 589 So. 2d 219, 222 (Fla. 1991) (mitigating evidence, including evidence that defendant suffered from bipolar affective disorder, outweighed aggravating factors and required a life sentence); *State v. Fierro*, 804 P.2d 72, 90 (Ariz. 1990) (reducing death sentence on proportionality grounds because, *inter alia*, "considering Fierro's history of psychological illness, we believe a careful examination of his background renders him less, not more, deserving of a death sentence than the 'typical' first degree murderer"); *People v. Carlson*, 404 N.E.2d 233, 245 (Ill. 1980) (reducing penalty to life imprisonment because defendant's "mitigating circumstances do not bespeak a man with a malignant heart who must be permanently eliminated from society").[7]

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[7] Appellate courts in several states have reversed death sentences in light of many of the same mitigating factors presented by Petitioner in this case, including evidence of brain damage and mental illness, learning disabilities, childhood abuse, reduced role in the crime, and relative youth. *See Allen*, 636 So. 2d at 497-98 (young age); *Besaraba*, 656 So. 2d at 447 (no significant history of prior criminal activity, crimes were committed while defendant was under the influence of great mental or emotional disturbance, defendant's history of alcohol and drug abuse and physical and emotional problems, good character, and badly deprived and unstable childhood); *Clark*, 609 So. 2d at 516 (on review finding only one aggravating factor was applicable and concluding that non-statutory mitigation evidence of mental health disturbance, sexual and psychological abuse as child,

and substance abuse at time of crime required a life sentence); *DeAngelo*, 616 So. 2d at 443-44 ("significant mental mitigation," including evidence of bilateral brain damage, hallucinations, and delusional beliefs); *Edwards*, 441 So. 2d at 93-94 (evidence of serious mental illness); *Hall*, 244 S.E.2d at 839 (reversing where the co-defendant-triggerman, received life and defendant received death); *Harvey*, 682 P.2d at 1386 (young age, lack of prior criminal history, and extreme mental or emotional disturbance at time of the crime); *Haynes*, 739 P.2d at 503-04 (mentally ill defendant was in and out of mental institutions for four to five years leading up to the crime); *Hazen*, 700 So. 2d at 1214-15 (disposition of co-defendant's case); *Herzog*, 439 So. 2d at 1381 (disposition of co-defendants' cases); *Knowles*, 632 So. 2d at 67 (organic mental disorder and brain damage, low average intelligence, chronic memory impairment, and substance abuse); *Kramer*, 619 So. 2d at 278 (history of alcoholism, evidence of mental stress, severe loss of emotional control, and potential for productive functioning in prison); *Livingston*, 565 So. 2d at 1292 (youth, inexperience, marginal intellectual functioning, childhood history of abuse, neglect, and substance addiction); *McKinney*, 579 So. 2d at 85 (mental deficiencies and alcohol and drug history); *Morgan*, 639 So. 2d at 13-14 (youth, brain damage, drug use at the time of the crime, and borderline intelligence); *Munn*, 658 P.2d at 487-88 (mental state at time of crime); *Nibert*, 574 So. 2d at 1062-63 (Fla. 1990) (physical and psychological child abuse, remorse, and influence of alcohol at time of crime); *Carlson*, 404 N.E.2d at 245 (extreme mental or emotional disturbance and remorse); *Johnson*, 538 N.E.2d at 1131 (lack of prior criminal record, remorse, capacity for rehabilitation and good character); *Puccio*, 701 So. 2d at 863 (role in offense); *Reddix*, 547 So. 2d at 794 (youth, mild mental retardation, mild mental illness, and accomplice role in the victim's death); *Robertson*, 699 So. 2d at 1347 (youth, impaired capacity, childhood abuse, history of mental illness, and borderline intellectual functioning); *Ross*, 474 So. 2d at 1174 (history of alcoholism and alcohol use at time of crime); *Slater*, 316 So.2d at 542 (reduced culpability as accomplice); *Smalley*, 546 So. 2d at 723 ("substantial" mitigating evidence, including evidence of clinical depression); *Songer*, 544 So. 2d at 1011-12 ("significant mitigation,"

The majority of states without proportionality review and the Federal death penalty scheme have other appellate statutory mechanisms — including review for arbitrariness and review of mitigation — that permit appellate courts to reverse death sentences in light of defendant's mitigating circumstances. *See* Appendix I; *see also State v. Bocharski*, 189 P.3d 403, 426 (Ariz. 2008) (independently weighing aggravating and mitigating circumstances and reversing death sentence because of the "limited aggravation evidence and the strong mitigation evidence"); *State v. Roque*, 141 P.3d 368, 406 (Ariz. 2006) (independently weighing mitigating evidence, including evidence of defendant's mental illness and low IQ, and concluding that a life sentence should be imposed because, "taken as a whole, the mitigating evidence here raises a substantial question whether death is an appropriate sentence"); *Chambers v. State*, 944 P.2d 805, 811 (Nev. 1997)[8] (reversing death sentence after conducting an excessiveness

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including mental health evidence); *Benson*, 372 S.E.2d at 522-23 ("strong" mitigating factors, including evidence that defendant was under the influence of a mental or emotional disturbance); *Bondurant*, 309 S.E.2d at 182-83 (defendant's remorse and intoxication at time of crime); *Bullock*, 525 So. 2d at 770 (lesser role in crime); *Fierro*, 804 P.2d at 90 (history of psychological illness); *McIlvoy*, 629 S.W.2d at 341-342 (limited education and intelligence, alcohol problems, and follower rather than leader personality); *Papasavvas*, 790 A.2d at 804-11 (brain damage, child abuse, youth, and remorse); *White*, 616 So. 2d at 26 (mental health problems and drug use); *Woods*, 733 So. 2d at 991 (borderline intellectual functioning, learning disabilities, and difficult childhood).

[8] Nevada amended its statute in 1985 to require only an excessiveness review, rather than proportionality and excessiveness. 1985 Nev. Stat. 1597, § 1.

review because of a lack of aggravating factors and because of evidence that defendant was intoxicated at the time of the crime); *People v. Leger*, 597 N.E.2d 586, 612 (Ill. 1992) (reducing defendant's sentence to life under constitutional authority based on evidence of mitigation, including military and work history, medical problems, lack of criminal history, and history of alcohol abuse); *see also State v. Claytor*, 574 N.E.2d 472, 481 (Ohio 1991)[9] (reversing death sentence after independently weighing aggravating and mitigating circumstances because the "mitigating factor involving [the defendant's] undisputed mental illness and the impact it had on his reasoning process should have been accorded more weight").

II. THE LOUISIANA SUPREME COURT IS FAILING TO CONDUCT A MEANINGFUL APPELLATE REVIEW OF MITIGATING EVIDENCE.

On its face, the plain language of the Louisiana death penalty statute and the state supreme court's rules provide for both comparative proportionality review and arbitrariness review.[10] Early Louisiana

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[9] In addition to a reweighing of mitigating and aggravating circumstances, Ohio authorizes a comparative proportionality review under its statute. *See* Appendix I.

[10] Under the state scheme, the Louisiana Supreme Court is required to review every death sentence to determine, *inter alia*, whether (1) "the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors;" (2) "the evidence supports the jury's finding of a statutory aggravating circumstance"; and (3) the death sentence is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." La. Sup. Ct.

cases reflect that at the beginning of its experience with comparative proportionality review, the Louisiana Supreme Court took this charge seriously and conducted meaningful and vigorous reviews pursuant to these rules and constitutional principles. In *State v. Sonnier*, 380 So. 2d 1 (La. 1979), for example, the court set aside defendant's death sentence as excessive after comparing it to other first degree murder cases given the extensive mitigating evidence in defendant's case. *Id.* at 7-9. Similarly, in *State v. Weiland*, 505 So. 2d 702 (La. 1987), the court concluded that defendant's death sentence was disproportionate to other sentences because of the presence of a large number of mitigating circumstances. *Id.* at 709-11. In *State v. Smith*, 400 So. 2d 587 (La. 1981), the court remanded the case to the trial court for factual development and re-evaluation of an aggravating circumstance as part of its excessiveness review because of the "scrupulous appellate review" required in death cases. *Id.* at 593.

In recent years, however, the Louisiana Supreme Court has failed to comply with this mandate. *See, e.g., State v. Draughn*, 950 So. 2d 583, 635 (La. 2007) (comparing the facts and circumstance of the crime to other capital cases but ignoring mitigating evidence); *State v. Lacaze*, 824 So. 2d 1063, 1085 (La. 2002) (same); *State v. Irish*, 807 So. 2d 208, 217 (La. 2002) (same). Certainly, in petitioner's case, the Louisiana Supreme Court did not conduct anything approaching the type of proper vigorous and meaningful proportionality review it conducted in the

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Rule 28 (specifying three step inquiry); La. Code Crim. Proc. art. 905.9.

1970s and 1980s. *See* Pet. Br. at 11, 27-28. Despite the data collection procedures designed to facilitate a robust comparison of the petitioner's case with others,[11] the Louisiana Supreme Court limited its analysis to consideration and comparison only of the *facts* of petitioner's *crime* compared to the *facts* of other death-sentence *crimes*. *State v. Holmes*, 5 So. 3d 41, 86-87 (La. 2008) (listing other cases with the same aggravating factors and concluding on this basis that the death sentence was not disproportionate). In conducting its proportionality review, the Louisiana Supreme Court did not so much as cite, let alone discuss, the trial record or defendant's sentencing memorandum that set forth the extensive mitigation evidence in Ms. Holmes's case, including her mental health diagnoses of FAS and post-traumatic stress disorder, her low intelligence, the fact that she likely had a reduced role in the crime, and her chaotic childhood. *Id.*

The Louisiana Supreme Court's current practice of conducting only a limited proportionality review without weighing or giving effect to mitigation evidence violates the Eighth Amendment. As the Louisiana Supreme Court recognized itself in the early years of its analysis, appellate review of mitigating circumstances is necessary to determine if the death penalty was imposed in an arbitrary fashion.

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[11] The Louisiana State Supreme Court rules require the trial judge, prosecution, and defense counsel to submit information relevant to a proportionality review, including information about the defendant's background, family situation, education, economic and employment status as well as information about all other first-degree murder cases from the district in which the sentence was imposed. La. Sup. Ct. Rule 28.

See Sonnier, 380 So. 2d at 7-8 ("Another indication of arbitrariness would be a jury's recommendation of death in disregard of numerous and persuasive mitigating circumstances which clearly outweigh any aggravating circumstances found to be present.").

As this Court has repeatedly recognized, juries sometimes improperly disregard mitigation, leading to disproportionate death sentences. In *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court explained that mitigating evidence of mental retardation and childhood abuse may act as a double-edged sword when evaluated by the jury because it may increase the jury's sense of fear of defendant. *Atkins*, 536 U.S. at 331; *Penry*, 492 U.S. at 324. Similarly, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court described the risk that the brutality and violence of the crime would overshadow the mitigating evidence of defendant's age, noting that in some cases, juries may conclude that defendant's age is an aggravating rather than mitigating factor. *Roper*, 543 U.S. at 573.

Mental health evidence is precisely the kind of mitigating evidence that some jurors may mistakenly treat as aggravating or give little or no weight. *See, e.g.*, American Psychiatric Ass'n, *Position Statement, Diminished Responsibility in Capital Sentencing* (2004), *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx (last visited June 2, 2009) ("[M]any observers of capital sentencing proceedings, including participating psychiatrists, believe that juries tend to give too little weight to mitigating evidence of severe mental disorder, leading to inappropriate execution of offenders whose

responsibility was significantly diminished by mental retardation or mental illness"); Christopher Slobogin, *Minding Justice: Laws that Deprive People With Mental Disability of Life and Liberty* 90 (Harvard University Press 2006) ("[M]ental illness is seen as a stigmatizing sign of violence proneness, not as a mitigating factor."); Symposium, *Mental Illness and the Death Penalty in North Carolina: A Diagnostic Approach* 25 (2006), *available at* http://www.charlottelaw.org/downloads/community/MI_DPreport.pdf (last visited June 2, 2009) ("Even when juries do consider mental disability as a mitigating factor, they tend to devalue that information in relation to aggravating evidence.").

Ms. Holmes's case is a textbook example of this risk. The penalty-phase testimony was uncontroverted that Ms. Holmes suffers from Fetal Alcohol Syndrome and brain damage due to her mother's consumption of whiskey and beer during pregnancy. Pet. App'x A8-9. Experts testified that Ms. Holmes has the dysmorphic facial features that are a hallmark of FAS, that neurological testing revealed significant cognitive deficits, and that neurological brain imaging confirmed organic brain damage. *Id.*

The most severe of the fetal alcohol spectrum disorders, FAS has "a devastating impact on the structure and function of the developing central nervous system." Christie L. McGee and Edward P. Riley, *Brain Imaging and Fetal Alcohol Spectrum Disorders*, 42 ANN 1ST SUPER SANITA 46, 46 (2006); *see also From Neurons to Neighborhoods: The Science of Early Childhood Development* 201 (Nat'l Research Council et al. eds., 2000). FAS results in structural and functional brain damage. Alison Niccols, *Fetal*

Alcohol Syndrome and the Developing Socio-emotional Brain, 65 BRAIN AND COGNITION 135, 136 (2007). Some children with FAS, such as Ms. Holmes, are diagnosed as mentally retarded.[12] All suffer from serious cognitive, attention, and behavioral problems. *Id.* at 135. Children with FAS suffer from impairments in frontal lobe executive functions, such as deficits in learning, memory, abstract reasoning, and judgment skills and social skills. *Id.* at 138. They have significantly impaired adaptive functioning skills. *Id.* at 139. These deficits will persist throughout their lifetimes. *From Neurons to Neighborhoods* at 200.

The secondary effects of FAS and its related organic brain damage result in increased "risk of victimization, criminalization, substance abuse, and

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[12] Although there was evidence from both a psychologist and psychiatrist that Ms. Holmes is mentally retarded and meets the definitions of mental retardation under Louisiana law, the Louisiana Supreme Court concluded that trial counsel did not submit this question to the jury and so was she not entitled to relief. Pet. App'x A22; *see also* Pet. App'x B. (Calogero, C.J., dissenting) ("In the case before us, Dr. Vigen and Dr. Williams both testified prior to trial that the defendant in their opinion met the definition of mental retardation set out in La. Code Crim. Proc. art. 905.5.1; Pet. App'x C. (Johnson, J. dissenting) (defense presented evidence from a psychiatrist and psychologist who testified that she met the definition of mental retardation). Negative IQ effects are associated with exposure to heavy prenatal alcohol consumption by mothers during the first trimester. *See, e.g.*, Sandra W. Jacobson, et al., *Maternal Age, Alcohol Abuse History, and Quality of Parenting as Moderators of the Effects of Prenatal Alcohol Exposure on 7.5-year Intellectual Function*, ALCOHOLISM: CLINICAL & EXPERIMENTAL RESEARCH (2004). Ms. Holmes's mother testified that she drank whiskey every day during the first trimester of her pregnancy before switching to beer. Pet. App'x A8.

psychiatric illness." *See, e.g.*, Caron Byrne, *The Criminalization of Fetal Alcohol Syndrome* 1 (2002), *available at* http://depts.washington.edu/fadu/legalissues/CFAS.pdf (last visited June 2, 2009). One study found that over seventy percent of teens and adults with FAS are the victims of sexual or physical abuse. Ann P. Streissguth et al., UNDERSTANDING THE OCCURRENCE OF SECONDARY DISABILITIES IN CLIENTS WITH FETAL ALCOHOL SYNDROME (FAS) AND FETAL ALCOHOL EFFECTS (FAE), FINAL REPORT TO THE CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) (University of Washington, Fetal Alcohol & Drug Unit, Tech. Rep. No. 96-06 1996).

Ms. Holmes's life history followed this risk pattern. At age eleven, she began to smoke marijuana daily. Presentence Report, at 10. One year later, at age twelve, she was raped by her sister's boyfriend and subsequently hospitalized for six months, where she was diagnosed with Post-Traumatic Stress Disorder and Major Depression. Pet. App'x A7; Appellant's Capital Sentence Review Memorandum (App. SRM) at 6-7. She was also sexually abused by her father and other adults living in his house. App. SRM at 7. This pattern of abuse and mental illness continued throughout Ms. Holmes's teen years. App. SRM at 6-7.

Individuals, such as Ms. Holmes, who are exposed to multiple traumas frequently develop Post-Traumatic Stress Disorder ("PTSD"). *See* Ronald Kessler, *Posttraumatic Stress Disorder: The Burden to the Individual and to Society*, 61 J. CLINICAL PSYCHIATRY (Supp. 5) 4 (2000). For many individuals suffering from PTSD, the condition will persist for many years. Soloman, S. & Davidson, J. *Trauma: Prevalence, Impairment and Service, Use, and Cost*, 58

J. CLINICAL PSYCHIATRY (Supp. 9) 5 (1997). PTSD itself is associated with a host of additional symptoms, including social withdrawal, impaired relationships with others, and self-destructive and impulsive behaviors. *Diagnostic and Statistical Manual of Mental Disorders* 465 (Am. Psychiatric Assoc. ed., 4th ed., Text Revision 2000).

Numerous studies have found that the majority of people suffering from PTSD also meet the diagnostic criteria for at least one other psychiatric disorder. *See* Ronald Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey,* 52 Archives Gen. Psychiatry, 1048 (1995); K. Brady et al., *Comorbidity of Psychiatric Disorders and Posttraumatic Stress Disorder,* 61 J. CLINICAL PSYCHIATRY 22-23, 27 (2000). In Ms. Holmes's case, she was diagnosed with Major Depression with psychotic features and prescribed both anti-psychotic medications and anti-depressants. App. SRM at 6.

The Louisiana Supreme Court was constitutionally required to consider Ms. Holmes's compelling mitigating circumstances when deciding whether her death sentence was proportionate. Meaningful appellate review is a constitutionally required component of any capital punishment scheme and, to serve its constitutional function, this review must contain a mechanism that enables the appellate court to assess the mitigation in a defendant's case.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant Brandy Aileen Holmes's Petition for *Certiorari*.

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APPENDIX

APPENDIX I:
DEATH PENALTY APPELLATE REVIEW PROCEDURES

Of the thirty-five states that currently have the death penalty, nineteen states provide for comparative proportionality review:

Alabama, Ala. Code §13A-5-53(b)(3) (enacted 1981);

Delaware, Del. Code Ann. Title 11 §4209(g)(2)(a);

Florida, by case law, *see e.g.*, *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995);

Georgia, Ga. Code Ann. §17-10-35(c)(3) (enacted 1973);

Kentucky, Ky. Rev. Stat. Ann. §532.075(3)(c) (enacted 1976);

Louisiana, La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (enacted 1977);

Mississippi, Miss. Code Ann. §99-19-105(3)(c) (enacted 1977);

Missouri, Mo. Ann. Stat. §565.035(3)(3) (enacted 1983);

Montana, Mont. Code Ann. §46-18-310(1)(c) (enacted 1977);

Nebraska, Neb. Rev. Stat. §29-2521.03 (enacted 1978);

New Hampshire, N.H. Rev. Stat. Ann. §630:5(XI)(c) (enacted 1986);

North Carolina, N.C. Gen. Stat. §15A-2000(d)(2) (enacted 1977);

Ohio Rev. Code Ann. §2929.05(A) (enacted 1981);

South Carolina, S.C. Code Ann. §16-3-25(C)(3) (enacted 1977);

South Dakota, S.D. Codified Laws §23A-27A-12(3) (enacted 1979);

Tennessee, Tenn. Code Ann. §39-13-206(c)(1)(D) (enacted 1992);

Utah, by case law, *see, e.g.*, *State v. Lafferty*, 20 P.3d 342 (Utah 2001);

Virginia Code § 17.1-313(C)(2) (enacted 1998);

Washington, Wash. Rev. Code Ann. §10.95.130(2)(b) (enacted 1981).

One state has eliminated "proportionality" review but has maintained "excessiveness" review:

Nevada, Nev. Rev. Stat. § 177.055(2)(e).

Seven states provide for substantive appellate review of mitigation through another mechanism:

Arizona, Ariz. Rev. Stat. Ann. §13-703.04(A) (enacted 1994) ("On review, the supreme court shall independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence.");

Colorado, Colo. Stat. Rev. §18-1.3-1201(6)(a) (2002) ("[T]he supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.");

Illinois, 720 Ill. Comp. Stat. §5/9-1(i) (enacted 2003) (requiring the Illinois Supreme Court to ask whether a death sentence is "fundamentally unjust" as part of its review); *see also People v. Leger*, 597 N.E.2d 586, 610 (Ill. 1992) ("This court has vacated death sentences where such an extreme penalty was found to be inappropriate, in view of any relevant mitigating factors.");

Indiana, Ind. Code Ann. §35-50-2-9(j) (enacted 2003) (review if "otherwise erroneous");

Kansas, Kan. Stat. Ann. §21-4627(c)(2) (enacted 1994) (appellate court review "whether the evidence supports the findings that an aggravating circumstance or circumstances existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances.");

Maryland, Md Code Ann., Crim. Law §2-401(d)(2)(iii) (enacted 2002) ("the evidence supports a finding by the court or jury that the aggravating circumstances outweigh the mitigating circumstances under §2-303(h) and (i)(1) of this title");

Oregon, by case law, *State v. Moore,* 927 P.2d 1073 (Or. 1996) (ruling State Supreme Court will review juror's conclusions about death penalty, including decision to impose death penalty).

Four states, although not providing for proportionality review or reweighing of mitigation, require an arbitrariness, prejudice, or product of passion review:

Connecticut, Conn. Gen. Stat. Ann. §53a-46b(b) ("The Supreme Court shall affirm the sentence of death unless it determines that: (1) The sentence was the product of passion, prejudice or any other arbitrary factor");

Idaho, Idaho Code Ann. §19-2827 (c)(1) (same);

Pennsylvania, 42 PA. Cons. Stat. Ann. §9711 (h)(3)(i) (same);

Wyoming, Wyo. Stat. Ann §6-2-103(d)(i) (same).

Three states, Arkansas, California, and Texas fail to provide for proportionality review, explicit appellate review of mitigation, or arbitrariness review.

Arkansas, Ark. Code Ann. §5-4-603(d)(1) (Arkansas Supreme Court is only required to conduct harmless error review of death sentence if no mitigation is found and one or more aggravators do not exist);

California, Cal. Penal Code §190.4(e) (California Supreme Court will review on appeal the trial

court's denial of a motion to modify a sentence of death to life);

Texas, Tex. Code Crim. Proc. art. 44.251(a) (Texas court of criminal appeals shall reform a death sentence for "legally insufficient evidence" to support an affirmative answer to one of three questions under Texas sentencing statute for reversible error).

Federal law provides for both a substantive review of penalty-phase evidence and an arbitrariness, prejudice, or product of passion review:

18 U.S.C. 3595(b) & (c) ("The court of appeals shall review the entire record in the case, including . . . the information submitted during the sentencing hearing" and shall determine whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.")

By case law, a review of death sentences imposed under the Uniform Code of Military Justice requires a review of all of the facts and circumstances of the case and a comparative proportionality analysis.

United States v. Curtis, 32 M.J. 252, 270-271 (CMA 1991).

* The three states who have recently abolished the death penalty either through legislative action or constitutional rulings — New Jersey, New Mexico, and New York — all provided for proportionality review. *See* New Jersey, N.J. Stat. Ann. §2C:11-3; New Mexico, N.M. Stat. Ann. §31-20A-4(C)(4) (enacted 1979); New York, N.Y. Crim. Proc. Law §470.30(3)(b) (enacted 1995).